IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 13887 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SWAMI NARAYAN MANAV SEWA TRUST & 1 - Petitioner(s)
Versus
R J SHAH FEE & ADMISSION COMMITTEE - Respondent(s)

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Appearance :
MR ND NANAVATI, SENIOR ADVOCATE WITH MR MITUL K SHELAT for Petitioner(s) : 1 - 2.
MR BHASKAR P.TANNA, SENIOR ADVOCATE WITH MS. MAHROOK N.KERRAVALA, ADVOCATE FOR TANNA ASSOCIATES for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 07/12/2006

ORAL JUDGMENT

1 Heard Mr.N.D.Nanavati, Senior Advocate appearing on behalf of the petitioner and Mr.B.P.Tanna, learned Senior Advocate appearing on behalf of the respondent. Considering the scope of the controversy between the parties and the view that the Court is inclined to adopt the matter is required to be heard finally. Hence **Rule.** Learned Advocate for the respondent is directed to waive service of Rule.

2 The undisputed facts are that the petitioner Trust is running a College in the name and style of Shree Swaminarayan Physiotherapy College, which is a self financed institute imparting Physiotherapy education with an intake of 50 students. The petitioner was permitted to charge fees amount to Rs.35,000/- p.a. For Financial Years 2003-2004, 2004-2005 & 2005-2006. On 30.11.2005 the respondent called upon the petitioner to furnish the details in the prescribed format for revising the fees for a period of three years commencing from Financial Year 2006-2007. Accordingly, the details were submitted by the petitioner sometime in February,2006. On 5.5.2006 the petitioner was informed that hearing was fixed to ascertain the views of all interested persons, parents/wards and their associations, managements, and such hearing was scheduled on 11th & 12th May,2006. The petitioner remained present at the said hearing. Subsequently the petitioner states that it came to know about the revised fee structure vide a

publication in vernacular press sometime in June, 2006 whereunder fees that the petitioner can charge from a student was fixed at a sum of Rs.30,000/- p.a. It appears that the reasons for fixing the fees at the said figure were not initially served on the petitioner and it is averred in paragraph No.14A of the petition that subsequent to the filing of the petition the respondent Committee enclosed a document with communication dated 19.8.2006.

3 The following prayers have been made in the petition :

> *"22. In the premises, therefore, the petitioner prays that:--*
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> *"A. That this Honourable Court be pleased to issue a writ of mandamus and/or other appropriate writ, order or direction, quashing and setting aside the fee structure prescribed by the Respondent in respect of the petitioner as is displayed by the Respondent-Committee on the internet, a copy whereof figures at Annexure "P-6" to the petition; and, thereupon be further pleased to direct that the fee structure as evolved by the petitioner at the rate of Rs.40,000/- per annum per student shall prevail for the academic years 2006-2007, 2007-2008 and 2008-2009;*
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> *B That pending admission, hearing and final disposal of the present petition, this Hon'ble Court be pleased to stay the implementation and operation of the impugned fee structure prescribed by the Respondent-Committee in respect of the petitioner and, thereupon, be pleased to*

permit the petitioner to prescribe fees at the rate of Rs.40,000/- per student per annum upon such terms and conditions as the Honourable Court may deem fit, just and proper;

C That this Honourable Court be pleased to award the costs of this petition to the petitioner herein;

D That the Honourable Court be pleased to pass such other and further orders as the nature and circumstances of the case may demand".

4 The grievance of the petitioner is that the petitioner was never accorded any hearing, the actual hearing being at the public meeting held on 11th & 12th May, 2006. That no reasons are assigned for reducing the fees per student from Rs.35,000/- to Rs.30,000/- p.a. Even if the document which is available as an enclosure to communication dated 19.8.2006 is perused the same is general in nature and does not deal with the requirements of the petitioner institute, nor does it assign any reason as to why the amount of fees has been reduced. The learned Senior Advocate has invited attention to the decision in case of *P.A.Inamdar And others Vs. State of Maharashtra And others, (2005) 6 SCC 537* with special reference to paragraph Nos. 149 & 150 of the said decision to submit that it was always open to the Court to undertake a judicial review of such a decision and for the said purpose take into consideration the note of caution sounded by the Apex Court in the said decision; he therefore urged that, though a prayer is made to grant the fees as demanded, the petitioner would be satisfied if the

impugned decision is quashed and set aside and the matter is remanded to the respondent committee for taking a fresh decision after granting an opportunity of hearing.

5 Mr.Tanna, learned Senior Advocate resisted the submissions made by inviting attention to the decision of the Apex Court in the case of *Islamic Academy of Education and Another Vs. State of Karnataka and others (2003) 6 SCC 697* with special reference to the observations made in paragraph No.7 at page No.721 to submit that the Committee was constituted in accordance with the directions of the Apex Court. That the Committee had acted in consonance with the principles enunciated by the Apex Court and there was no case made out for entertaining the petition, even if a judicial review as such was permissible. Referring to the details submitted by the petitioner – institute with special reference to Part-II relating to Infrastructure as on 31.3.2005 it was pointed out that the land was a leasehold land, the petitioner had no college building of its own and was sharing a building with another institute. That there were no details regarding the cost of the building as well as depreciation, if any, and therefore according to Mr.Tanna there was no error committed by the Committee while arriving at the decision. He also referred to Part-VIII which deals with Details of new Investments made vis-a-vis budgets to point out that there was no budgetary figure provided and therefore the Committee had rightly not taken into consideration any project cost into consideration for the purpose of determining the fees. Inviting attention to the documents containing reasons/basis for fixing the fees at a sum of Rs.30,000/- it was submitted that on an

overall view of various observations and recommendations it was apparent that the Committee had applied its mind and had arrived at a rational decision which was not required to be interfered with. That even the procedure adopted by the Committee could not be faulted with, as the Committee had constituted a sub-committee which inspected the Colleges, ascertained the views of the students and the staff members, sought clarification and further information on the issues arising out of the analysis of the data submitted by the petitioner, and lastly held a public hearing on 11th & 12th May,2006. That the principles enunciated by the decision in the case of P.A.Inamdar (supra) have been borne in mind while arriving at the decision and the basis adopted is founded on a study report rendered by one Shri Y.H.Malegam, a reputed and experienced Chartered Accountant.

5.1 He therefore urged that in light of the principles laid down by the Apex Court, as to the circumstances in which the Court can undertake judicial review, in the case of *Tata Cellular Vs. Union of India (1994) 6 SCC 651* the Court should not interfere in a decision arrived at by the Committee which comprised of experts in the field. That at best it can be stated that the view expressed by the Committee was one view and even if there was another view possible that by itself was not sufficient to permit the Court to intervene.

6 From the case of *Tata Cellular* (supra) the following paragraphs were pointed out from the Head Notes in support of the submissions made :

"The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself. It is thus different from an appeal. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the Court would interfere. It is not the function of a judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator. (paras 74, 75, 82, 152 and 154)"

"The duty of the court is thus to confine itself to the question of legality. Its concern should be :

1 Whether a decision-making authority exceeded its powers ?

2. committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could

have arrived at. The decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. Another development is that referred to by Lord Diplock in R.v. Secretary of State for the Home Deptt. ex. Brind, viz. the possible recognition of the principle of proportionality. Two other facets of irrationality may be mentioned :(1) It is open to the court to review the decision -maker's evaluation of the facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld. (2) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. (Paras 77,79,80 and 81)".

"In all these cases the test to be adopted is that the court should "consider whether something has gone wrong of a nature and degree which requires its intervention".(Para 77).

The principles deducible are :

(1) The modern trend points to judicial restraint in administrative action.

(2)The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3)The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere . However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and

lead to increased and unbudgeted expenditure. (Para 94)".

7. In the case of *Islamic Academy of Education and Another Vs. State of Karnataka and others* (supra), it has been laid down that:

"Each institute will be entitled to have its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans for expansion and/ or betterment of the institution etc. Of course there can be no profiteering and capitation fees cannot be charged. It thus needs to be emphasized that as per the majority judgment imparting of education is essentially charitable in nature. Thus the surplus/profit that can be generated must be only for the benefit/use of that educational institution. Profits/ surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise."

Stating thus, the Apex Court has set out the composition of the Committee which shall be entitled to fix the fees till the point of time the Government frame appropriate statute and regulations. Thereafter the Apex Court has specified as to how the Committee is expected to function in the following words :

"Each educational Institute must place before this Committee, well in advance of the academic year, its proposed fee structure. Along with the proposed fee structure all relevant documents and books of

accounts must also be produced before the committee for their scrutiny. The Committee shall then decide whether the fees proposed by that institute are justified and are not profiteering or charging capitation fee. The Committee will be at liberty to approve the fee structure or to propose some other fee which can be charged by the institute. The fee fixed by the Committee shall be binding for a period of three years, at the end of which period the institute would be at liberty to apply for revision. Once fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise e.g. donations, the same would amount to charging of capitation fee."

8. This was followed by the Apex Court decision in the case of *P.A.Inamdar* (supra), wherein in paragraph Nos. 149 & 150 of the decision it has been observed :

"149. xxx xxx xxx We expect the Committees, so long as they remain functional, to the more sensitive and to act rationally and reasonably with due regard for realities. They should refrain from generalising fee structures and, where needed, should go into accounts, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution.

150. We make it clear that in case of any individual institution, if any of the Committees is found to have exceeded

its powers by unduly interfering in the administrative and financial matters of the unaided private professional institutions, the decision of the Committee being quasi-judicial in nature, would always be subject to judicial review".

9 Bearing in mind the aforesaid principles the present decision of the Committee may be tested at the anvil of well settled principles of judicial review. Though in the course of hearing a faint contention was raised on behalf of the Committee that strictly speaking the decisions of the Apex Court did not envisage any hearing per se, the respondent Committee having already granted hearing it had complied with the requirements of principles of natural justice. It is an admitted position that the hearing that was granted was a public hearing and whether that would serve the purpose or not is an issue which need not be entered into in the facts of the present case for the reasons that follow hereinafter.

10. As can be seen from the document available as enclosure to communication dated 19.8.2006 the first three pages are admittedly laying down general propositions including the Approach and Methodology adopted by the respondent Committee. In relation to the Committee's views pertaining to the application of revision in the fee structure, viz. whether the same should be applicable to the existing students or only to the newly inducted students, the Committee has found that the same has to be applicable to all the students for whom the cost is being incurred. It is recorded "in the case of Physiotherapy Colleges, for instance the fees are fixed based on normal recurring cost of revenue nature

which is directly related to education. Since this cost is subject to inflation, a periodic revision becomes necessary, and when the cost is revised it should be applicable to all the beneficiaries on a given date. Though this might seem to be unrelated to the annual fixation of fees it shall be demonstrated hereinafter that these observations fly in the face of the observations made by the Committee when the Committee fixes the fees in the case of the petitioner College. It is also necessary to note that the subject matter of the note which lays down the approach and methodology as well as guiding principles pertains to finalisation of fee structure for the period of three years from 2006-2007 to 2008-2009.

11 Reverting back to observations and recommendations made in relation to the petitioner College it is necessary to take note of the reasons assigned by the Committee for holding that the hike the College has proposed is too high. It is stated :

> *"2. We also note that the expenses in 2004-05 includes excessive repairs, exp. Incurred for other courses. The projected expenses for the future are abnormally high and lack justification . The report of the technical analysis also indicates the lack of good infrastructure. Therefore, we have in our final analysis, discounted such projections in line with the current cost structure.*
>
> *3. The Committee is aware that too high a level of fee is not within the reach of all students.*

Availment of loans from bank or private source has its own adverse implications.

4. The element of charity has to be borne in mind and it enters from the top. Once the cost structure is finalized, the management has to moderate the same to provide for some relief to a class of students who have limited resources and also have limited access to borrowing.

5. Even we discard all these considerations, total cost of education beyond a limit would only favour "means at the cost of merit". This aspect of dental education can not be over looked. Though this is not within the jurisdiction of the fee committee, it is a submission for the kind consideration of the enlightened management who aspire to benchmark their institutions with the best in the country.

6. The projections for inflation and development has an element of uncertainty and contingency. While it is true that the fee fixed now is valid for a period of three years, it is not fair to accept the projections in its entirety at the beginning of the period of 3 years and work out the fees accordingly. The matching principle of accounting expects that the cost either precedes revenue or co-exists with revenue. Revenue cannot precede cost and as such fees should not be

permitted to be recovered solely on cost projections. A balance of timing needs to be struck. As such the Committee recommends to charge for inflation and development at the end of each year based on the actual increase in the cost and capital investments.

7. In the matter of development allowance, the Committee would like to differentiate between the investments in the nature of projects and investment in the nature of modernization and improvements. The former one need to be met through long term of permanent resources like donations or trust support. It is only the latter one that need to be raised from the students through fees. As such the Committee has not considered investments for new projects of large size such as constructions of new complex or setting up of a new department for latest development. However depreciation on such capital investments will be eligible for costing purpose.

Based on these observations, the Committee has made adjustments for the hospital cost, staff salary cost and expenses for the patients care.

In the background of these observations, the Committee would prefer to advise the management for reconsideration of the fee structure based on the actual cost for each year

advises the College to provide for some relief to the students keeping in mind the socia economic scenario prevailing now.

Accordingly, the fees for the year 2006-07 has been worked out based on the fee structure of the bench marked college. Keeping this as the base fees, for the year 2007-08 and 2008-09, the Committee would like to allow for annual increase up to 5% for inflation and up to 7.5% for growth and development based on the actual increase in the cost due to inflation and actual capital expenditure in the immediate previous year.

However, this does not entitle the college to revise the fee structure automatically. The college will have to apply the Fee Committee in a prescribed format for the revision of fee structure for inflation and development along with audited accounts latest within two months of the close of the year. The application will be supported by the certificate from the Chartered Accountants certifying the rise in the cost and investments made in the prescribing year.

The Committee therefore recommends a fee of Rs.30,000 for the year 2006-07 with a permission to revise the same for the year 2007-08 as

indicated above".

12 When one reads so called reasons it becomes apparent that what is stated in paragraph Nos. 2, 3, 4 & 5 are general observations and recommendations which do not reflect as to how the same are relevant for the purpose of fixation of fees at a sum of Rs.30,000/- p.a. as against existing fees of Rs. 35,000/- p.a. In fact in paragraph No.5 the sentence "*This aspect of dental education cannot be over looked"* definitely conveys that the reasons assigned are not germane to the decision making process, this being an instance of non application of mind and not a mere slip of pen.

13 However, when one comes to paragraph No. 6 the recommendation made by way of last sentence is found to be baseless considering the fact that as laid down by the Apex Court the fees are to be fixed for a period of three years and there is no provision which empowers the Committee to charge for inflation at the end of each year. May be to the extent of development cost in relation to capital investments the Committee might be justified, considering the fact that in the part relating to details of new investments made vis-a-vis budgets the petitioners have failed to supply details in the columns showing budgetary allocation. However, how does one expect the institution to comply with the direction of the Supreme Court in the case of *Islamic Academy of Education* (supra) that " The fee fixed by the Committee shall be binding for a period of three years" when the Committee itself fails to arrive at a decision for the entire block of three years. Even the students/parents must know what they are required to pay for

three years.

14 Similarly in paragraph No.7 it is observed : *"As such the Committee has not considered investments for new projects of large size such as constructions of new complex or setting up of a new department for latest development. However, depreciation on such capital investments will be eligible for costing purpose".* This observation, to say the least, has no relevance with the claim made by the petitioners considering the details available in the prescribed format.

15 It is further recorded that " the *Committee would prefer to advise the management for reconsideration of the fee structure based on the actual cost for each year advises the College to provide for some relief to the students keeping in mind the socio economic scenario prevailing now".* The only thing that can be stated qua this observation is that the Committee is not assigned any advisory function. To the contrary the pronouncements made by the Apex Court, time and again, categorically require that the fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available etc. The Committee is only required to decide whether the fees proposed by the institute are justified or not considering that there is no profiteering and charging of capitation fees.

16 In the next paragraph it is recorded that the fees for the year 2006-2007 have been worked out based on the fee structure *"of the bench marked college".* This statement indicates that the

Committee has lost sight of the fact that fees for each institute have to be fixed taking into consideration the various requirements of a particular institute. It is not possible to know from the aforesaid statement as to which is the bench marked college, and what is its fee structure, so as to appreciate as to whether the figure arrived at is correct or not, in light of the facts and circumstances of the petitioner-institute. In other words, whether the decision has been arrived at after taking into consideration all relevant material.

17 Thereafter, it is stated that keeping the aforesaid figure as the base fees, the Committee would like to allow for annual increase up to 5% for inflation and up to 7.5% for growth and development based on the actual increase in the cost due to inflation and actual capital expenditure in the immediate previous year for the years 2007-2008 and 2008-2009. That this does not entitle the College to revise the fee structure automatically and the College will have to apply to the Fee Committee in a prescribed format for the revision of fee structure for inflation and development along with audited accounts within two months of the close of the year supported by a certificate from the Chartered Accountant certifying the rise in the cost and investments made in the preceding year. The only thing that can be said qua the aforesaid observations is that the Committee has either failed to grasp the duties assigned to it by the decisions of the Apex Court, or in the alternative, has taken upon itself the task of determining fees, to use the words of the Apex Court "*with the zeal of a pedantic schoolmaster*" . At the cost of repetition it is required to be stated that in the case of *Islamic Academy of Education* (supra) the

Apex Court has observed that the fee fixed by the Committee shall be binding for a period of three years. In the circumstances, there is no question of calling upon the College to apply in a prescribed format for revision of the fee structure every year. The Court does not wish to sound harsh, but it is necessary to state that the learned Member of the Committee who has signed the document has possibly been overwhelmed by the job assigned.

18 As can be seen from the first communication dated 30.11.2005 the Committee had called upon the petitioner in relation to the stated subject matter viz., decide the fee structure of Self Financed College on a triennial (which literally means "lasting or happening every three years") basis and that is how the entire submissions have proceeded, including public hearing, and yet if the aforesaid report can be stated to be a report of the Committee, it has been directed that the fees shall be only for the year 2006-2007 with a permission to revise the same for the subsequent two years as indicated in the report. Admittedly, it appears that the views expressed by one of the Members of the Committee have been termed and styled as the report of the Committee reflecting total non application of mind.

19. The concept of judicial review and the principles in relation to the same have been set out hereinbefore. Applying the said principles to the facts it is apparent that the decision arrived at by the respondent Committee is based on a fallacy regarding powers available with the Committee. Suffice it to state that the decision making process suffers from the principle of irrationality as defined

in the Wednesbury principle. The instances cited hereinbefore are not for the purpose of reappreciating the evidence on record, but to the limited extent of pointing out the unreasonableness in the decision making process which is in defiance of logic. It cannot be termed to be a decision which a reasonable person properly informed as to facts and evidence on record and the law would have arrived at in light of the principles laid down by the Apex Court.

20. The reason for stating as aforesaid is that it is a matter of common knowledge, and judicial cognizance can be taken of the fact that the inflation, even with varying rate, cannot permit a downward revision in the fees. The Committee has unfortunately taken such a decision by reducing the fees which were pegged at a figure of Rs.35,000/- p.a. for three years to a figure of Rs. 30,000/- for 2006-2007. In the entire report there is no basis available for reduction of the figure, even if one proceeds on the assumption that the demand made for an upward revision was not liable to be granted.

21. In the circumstances, the decision of the Committee cannot be upheld for the foregoing reasons. The report and the decision to fix fees at a sum of Rs.30,000/- p.a. for Financial Year 2006-2007 is quashed and set aside and the matter is restored to the respondent Committee for taking a decision afresh in accordance with the principles enunciated by the Apex Court bearing in mind the scope and extent of powers available to the Committee. Till the Committee records a fresh decision the petitioner College shall not

collect any higher amount from the students, but at the same time bring to the notice of the students the outcome of this petition and the pendency of proceedings before the Committee so as to enable the students to intervene and make their submissions as and when hearing is granted to the petitioners by the respondent Committee.

22. In the aforesaid circumstances, the petitioner College shall approach the respondent Committee on or before 12.12.2006 and upon the petitioner so approaching, the respondent Committee shall fix a date of hearing which shall not be later than a fortnight from 12.12.2006. The Committee shall invite the students of the petitioner institute at such hearing. After such hearing takes place the respondent Committee shall record a fresh decision within a period of ten days therefrom as agreed by the learned Counsel for the Committee.

23. The petition is allowed in the aforesaid terms. Rule made absolute. There shall be no order as to costs.

(D.A.Mehta, J)

m.m.bhatt.